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Effects of Legal Ethics in the Business World

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NOTES

EFFECTS OF LEGAL ETHICS IN THE BUSINESS WORLD

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HISTORY OF THE RELATIONSHIP

Traditionally one law firm representing one organization for all its legal needs constituted the attorney-client relationship in the business world.[1] The legal ethics code adequately protected this simple relationship and thus achieved its goal of client protection.[2] However, changes in business interactions, globalization

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[1] *See* Burton Lehman, *Business Forum: An End to Congeniality; When the Law Becomes Big Business*, N.Y. TIMES, Feb. 5, 1989, § 3 at 3 (lamenting the shift towards increased specialization); *see also* Robert L. Nelson, *Practice and Privileges: Social Change and the Structure of Large Law Firms*, AM. B. FOUND. RES. J. 95, 97, 109 & 133 (1981) (describing the dramatic shifts in attorney representation and firm size). *See generally* ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 428-36 (4th ed. 2002) (examining the ethical considerations of traditional representation through correspondence between Davis Dudley, attorney for Erie Railroad, and Samuel Bowles, of Springfield Republican).

[2] *See* Bryant C. Danner, *The Growth of Large Law Firms and Its Effect on the Legal*

and business expansion have altered the formally simple relationship between the business clients and their legal representatives, leaving archaic the protection that the ethics code afforded these relationships.

Today it is not uncommon for a large individual business entity to be represented by a variety of law firms while a single individual law firm may represent a variety of businesses.[3] As a result, law firms have grown and expanded dramatically, but the increase in the complexity of relationships with clients has not yet been considered or reflected in the ethical guidelines.[4] As a consequence, the client's protection has eroded, and with it, the corporate client's choice of legal representation.[5]

All law firms, and all lawyers, must follow state rules of professional responsibility when dealing with conflict issues.[6] In order to address the issues arising out of the need to protect the client, in 1970 the American Bar Association created the ABA Model Code of Professional Responsibility, and in 1983 was su-

Profession and Legal Education: Looking at Large Law Firms – Any Role Left for the Law Schools?, 64 IND. L. J. 447, 447 (1989) (explaining how Chief Justice William Rehnquist felt institutional loyalty was declining due to the increasing growth of firms); KAUFMAN & WILKINS, *supra* note 1, at 16-18 (outlining the changes in rules of professional responsibility to keep pace with profession); Joan Travistino, *Regulating Multi-State Law Firms*, 32 STAN. L. REV. 1211, 1211-14 (1980) (noting that "prior to the adoption in 1969 of the ABA Model Code of Professional Responsibility, few firms maintained offices in other states").

[3] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-388 (1994) (stating "growth, development, and diversity of the legal profession" have moved lawyers away from traditional practice models and toward large networks spreading over numerous cities); Lehman, *supra* note 1, at § 3 at 3 (outlining how specialization changed the legal profession); Stuart Taylor Jr., *Law Firms Becoming National in Scope*, N.Y. TIMES, Jan. 11, 1981, § 12 at 50 (describing the expansion of firms as designed "to provide a much wider array of services" to clients).

[4] *See* KAUFMAN & WILKINS, *supra* note 1, at 15 (describing the recent increases in attention to legal ethics due to a greater complexity in the profession); Tamar Lewin, *What's New in the Legal Profession*, N.Y. TIMES, June 3, 1984, § 3 at 17 (noting the massive numbers of clients represented by big firms). *See generally* Barbara A. Curran, THE LAWYER STATISTICAL REPORT, THE U.S. LEGAL PROFESSION IN 1995 (Am. Bar Found. Jan. 1, 1999) (discussing the increase in size and scope of firms).

[5] The increasingly complex relationships, especially impacting the New York City business arena, is not considered or acknowledged in the Disciplinary Recommendations made by the New York State Code of Professional Responsibility.

[6] *See* James Podgers, *Ethics Code Rework: New ABA Model Rules May Be Under Construction in the Next Few Months*, 87 A.B.A.J. 58, 58 (2001) (explaining "the model rules serve as the basis for binding rules of professional conduct for lawyers in 42 states and the District of Columbia"); Stuart Taylor Jr., *Ethics Code Isn't Open and Shut*, N.Y. TIMES, Aug. 7, 1983, § 4 at 7 (explaining how applying the Model Rules could result in disciplinary action for attorneys if adopted by the state). *See generally* Beth Nolan, *Removing Conflicts From the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 1-2 (1990) (discussing historical situations in which independent counsel has faced conflicts).

perceded by the ABA Model Rules of Professional Conduct.[7] While not binding, each state has adopted at least the framework of the Rules; some have adopted the Rules in toto, while others have chosen to incorporate their own ideas, and federal courts generally take on the rules of the state in which they sit.[8]

Difficulties arise when issues are resolved according to the Model Rules but results are contrary to the purpose of the Rules or conflict with the way the courts are interpreting how a situation should be resolved.[9] This has occurred more recently with the expansion of law firms and their attempts to match a wide variety of corporate needs.[10] Likewise, growth within multinational companies, expansions both within the corporation and geographically, causes the creations of non-traditional attorney-client relationship.[11] Conflicts of interest arise much more frequently in these non-traditional relationships, often leading to disqualification.[12] The traditional conflict of interest occurs

[7] *See A New Ethics Code: ABA Adopts Model Rules of Professional Conduct*, 70 A.B.A.J. 79, 79 (1984) (announcing the adoption of the Model Rules and explaining the history of preceding ethical codes); Stuart Taylor Jr., *U.S. Criticizes ABA's Lawyer Code*, N.Y. TIMES, Sept. 25, 1984, at D17 (noting that the ABA adopted rules after years of debate). *See generally* MODEL RULES OF PROF'L CONDUCT (1983).

[8] *See* KAUFMAN & WILKINS, *supra* note 1, at 16-17 (stating that by 1983 every state had adopted a model code of professional responsibility in some form and the trend in federal courts is to adopt rules adhered to by local courts although there is no standard practice); *see also* I.B.M. v. Levin, 579 F.2d 271, 279 n.2 (3d Cir. 1978) (illustrating how federal courts use ethical rules as adopted by state courts); Ethical Standards for Attorneys for the Government 28 U.S.C. § 530 (B) (2002) (making state ethics rules binding on U.S. attorneys in federal courts).

[9] *See generally* Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice-Is Rule 8.5 the Answer, an Answer or No Answer at All*, 36 S. TEX. L. REV. 715, 747-48 (1995) (addressing multijurisdictional conflicts); Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 323 (indicating the Model Rules often suffer from varying interpretations); Cristy Ray, *Recent Opinions From the ABA Standing Committee on Ethics and Professional Responsibility*, 8 GEO. J. LEGAL ETHICS 1099, 1115 (pointing out that a court may override the duty of confidentiality).

[10] *See* Taylor, *supra* note 3, §12 at 50 (outlining the expansion of law firms). *See generally A New Ethics Code: ABA Adopts Model Rules of Professional Conduct*, 70 A.B.A.J. 79, 79 (1984) (explaining how changes in the legal profession increased court challenges of rules and spurred modification of the Code); Danner, *supra* note 2, at 447 (discussing Chief Justice Rehnquist's belief that large firms present major ethical issues).

[11] *See* Analytica, Inc. v. NPD Research, 708 F.2d 1263, 1274 (7th Cir. 1983) (Coffey, dissenting) (explaining how changes in firm size and legal practice complicate a conflict of interest analysis); *see also* Steel v. General Motors Corp., 912 F. Supp. 724, 746 (D. N.J. 1995) (disqualifying a firm because of its failure to screen new associates). *See generally* Brennan's Inc. v. Brennan's Rests. Inc., 590 F.2d 168, 174 (5th Cir. 1979) (disqualifying an attorney for representing a client in a patent dispute against a split off company which the attorney had previously represented).

[12] *See* KAUFMAN & WILKINS, *supra* note 1, at 35 (commenting on how conflicts of interest have always been among the most serious problems in the legal profession). *See*

where representation of one client conflicts with the representation of another client.[13] To resolve these issues business and law firms should turn to the Model Rules for guidance on how to handle such situations. Unfortunately, in the area of corporate conflict of interest the Rules are often unhelpful. The Rules can create confusion and in some cases, recommend a result that counters the overall purpose of the Rules.[14]

This article will examine some of the difficult situations that have arisen out of the growing corporate and legal structures and their possible resolutions according to the Code. Part I sets out hypothetical situations which are referred to in the subsequent sections. Part II describes the problems that exist in these hypothetical situations according to the rules as they stand. Part III addresses the resolutions suggested by the Code. Part IV suggests possible alternatives to the existing Code.

PART I—HYPOTHETICAL SITUATIONS

Hypothetical I – Concurrent Conflict: Current Client conflicts

Consider the situation in which party X contracts with A who later goes into business with B. B's long-standing counsel, law firm C, represents B. X later begins litigation to recoup compensation for a liability stemming from the original transaction for

generally MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002) (stating the general rules for conflicts of interest); Arthur D. Burger *Tiptoeing Between New Conflicts*, LEGAL TIMES, Aug. 10, 1998, at 23 (discussing the increased pressure to address potential conflicts of interest and inherent difficulties).

[13] *See* Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 792 (S.D.N.Y. 1991) (explaining that courts are to apply a per se rule of disqualification for conflicts of interest concerning concurrent representation); *see also I.B.M.*, 579 F.2d at 283 (holding disqualification appropriate for conflicts of interest even absent any specific injury). *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7 (a)(1) (2002) (describing representation of clients with adverse interests as conflicted).

[14] *Compare* Lara E. Romansic, *Conflict of Interest: Stand by Your Client?: Opinion 95-390 and Conflicts of Interest in Corporate Families*, 11 GEO. J. LEGAL ETHICS 307, 308 (1998) (noting "Model Rule 1.7, the basis for Opinion 95-390, seems to allow for representation of a party with interests adverse to the existing client's corporate affiliate"), *with* Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 14 (1998) (stating "Rule 1.7 prohibits representing directly adverse clients or clients whose representation may be materially limited by responsibilities to other clients"). *See generally* Miriam P. Hechler, *The Role of the Corporate Attorney Within the Takeover Context: Loyalties to Whom?*, 21 DEL J. CORP. L. 943, 944-45 (1996) (discussing the functions and problems involved with attorneys' roles in corporate takeovers, and the lack of guidance offered by the Model Rules).

which he alleges A and B owe him. The Rules stipulate C cannot represent B unless both X and A sign a waiver. If X refuses, B will be forced to spend time and money finding, hiring and informing a new attorney from a new firm about this litigation. By doing so X is supplied with a strategic opportunity in which X may use the Code of Ethics Rules *that exist for B's protection* to X's own benefit. In effect, X appears to have the opportunity to use the protection meant for B to his advantage. X gains more leverage by potentially delaying the litigation, and causing greater expense to A and B—factors which may increase A and B's willingness to settle.

Hypothetical II – Concurrent Conflict: Affiliated Corporations

Attorney C represents company A on a transactional basis. A is a subsidiary of company Z. C also represents Y in litigation against Z. According to the Ethical Considerations, it is understood from the Model Code[15] that representation of a company does not by itself bind a lawyer to its client's parent/subsidiaries, which would allow C the freedom to represent Y in a suit against Z.[16]

Hypothetical III – Successive Conflict: The Substantial Relation Test

Attorney C has represented client corporation A in the past either on a transactional basis or in litigation. Y seeks to hire C in litigation against A. Under the Model Rules, subsequent representation of a client adverse to a former client poses a problem where the matter of the representation is 'substantially simi-

[15] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (a)(2) (2002) (stating a concurrent conflict of interest exists where there is a significant risk that the representation will be materially limited by the attorney's responsibilities to another client, former client, third party, or lawyer's personal interest); *id.* at R. 1.7 cmt. 1 (asserting "[L]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."); Douglas R. Richmond, *Accommodation Clients*, 35 AKRON L. REV. 59, 62 (2001) (noting "Rule 1.7 (a) forbids concurrent adverse representations even where the opposing clients' matters are wholly unrelated").

[16] *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (a) (2002) (stating lawyers employed or retained by an organization represent the organization through its duly authorized constituents); GEN-COR, LLC v. Buckeye Corrugated, Inc., 111 F. Supp. 2d 1049, 1057 (2000) (denying a motion to disqualify counsel in a suit between a parent company and its subsidiary). *But see* Musheno v. Gensemer, 897 F. Supp. 833, 836-37 (1995) (noting an attorney's ability to represent both an organization and its constituents under Rule 1.13 is subject to Rule 1.7).

lar.'[17] With some exceptions, attorney C will be required to reject Y as a client.[18]

Hypothetical IV – Successive Conflict: Affiliated Corporations and the Substantial Relation Test

An added twist combines Hypothetical II and III. This occurs where Attorney C has formerly represented Company A, a subsidiary of Z. Y, a subsidiary of X, seeks representation by C in litigation against Z. If the former representation of A contained matter substantially similar to the representation Y seeks, C will be unable to accept Y as a client, despite never having represented Z, the adverse party.

PART II—EXISTING PROBLEMS WITH THE APPLYING THE RULES

Focusing on Hypothetical example I, current client conflicts, which may occur when a law firm, with a long-standing relationship representing its client in transactional interactions, may be barred from representing the same client in litigation stemming from one of those transactions because the Model Rules do not allow any adverse representation that may be a basis for a client-client conflict of interest.[19] The underlying purpose of Model Rule 1.7 is to protect the element of loyalty[20] in the attorney-

[17] *See* Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 589 (3d Cir. 1999) (noting the policies underlying Rule 1.9 include preventing confidences from being used against former clients); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.9 (a) (2002) (stating, after formerly representing a client, an attorney cannot represent another person in same or substantially related matters in which the second client's interests are materially adverse to the interests of the first client); *id.* at R. 1.9 cmt. 3 (defining 'substantially related' as involving the same transaction, or a substantial risk that confidential information obtained in prior representation would materially advance the client's position in a subsequent matter).

[18] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (a) (2002) (allowing representation where a former client has given written consent after consultation); *id.* at R. 1.9 (c)(2) (recognizing that other rules may require or permit revealing information protected under Rule 1.9); *id.* at R. 1.9 cmt. 1 (discussing the general rule that lawyers have certain continuing duties regarding confidentiality and conflicts of interest even after the client-lawyer relationship ends).

[19] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2002) (prohibiting representation of any litigation against a current client (absent consent), even if the matters are completely unrelated); *id.* at R. 1.7 cmt. 3 (stating reasonable preventive procedures must be adopted to protect a firm from creating conflict); *id.* at R. cmt. 7 (noting that directly adverse conflicts may arise in transactional matters).

[20] *See* I.B.M. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (noting an attorney's failure to provide undivided loyalty produces a decrease in public confidence and creates an appear-

client relationship, the client confidences, an appearance of proper form[21] and the rule governing lawyer independence.[22] The standard adopted by the Code to determine whether a client-client conflict exists is whether a disinterested attorney would advise either client against this representation.[23] While this seems straightforward, practical situations arise that push the definitions of the provision's wording to the point of, in some instances, contorting the actual purpose of the Code itself.

Hypothetical II, affiliated corporations, can take the various forms. One example is where a lawyer represents a syndicate on a transactional basis.[24] If one member decides to sue another member on a wholly unrelated matter the transactional lawyer

ance of impropriety which may lead to disqualification); *Lazy Oil*, 166 F.3d at 589 (upholding a duty of loyalty to any client that has a right to expect such loyalty); Prisco v. Westgate Entm't, Inc., 799 F. Supp. 266, 271 (D. Conn. 1992) (noting "Rule 1.9 is designed to address not only the narrow need to protect client's confidences, but also to establish broader standards of attorney loyalty.").

[21] *See I.B.M.*, 579 F.2d at 283; Analytica, Inc. v. NPD Research, 708 F.2d 1263, 1277-78 (7th Cir. 1983) (Coffey, J., dissenting) (suggesting that a law firm that switched sides created an appearance of impropriety which could be cured through means other than disqualification); *Prisco*, 799 F. Supp. at 271 (noting one goal of Rule 1.9 is to maintain the public's trust in the legal system); *see also* Gregory Zimmer, *Conflict of Interest: Suing a Current Client: Responsibility and Respectability in the Conduct of the Legal Profession*, 11 GEO. J. LEGAL ETHICS 371, 391 (1998) (noting "in many court decisions rejecting concurrent representation, the act of suing a current client can harm . . . the maintenance of public confidence in the legal profession.").

[22] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105 (C) (stipulating "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such a representation on the exercise of his independent professional judgment on behalf of each"); MODEL RULES OF PROF'L CONDUCT R. 1.7 (1995) (suggesting the intended meaning of 'obvious that he can adequately represent' in DR 5-105 (c) means if there is a reasonable belief that personal interests or desires will adversely affect services rendered or advice given, representation should be declined); *id.* at R. 1.7 cmt. 14 (noting if a lawyer's dual role as director and corporate attorney compromises the lawyer's independence, she should not serve as director).

[23] *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 cmt. 5 (1995) (noting "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent"). *See generally* 22 NYCRR § 1200.20 (2002) (noting the standard applies to an attorney whose business, personal property, or financial interests may be reasonably believed to affect the exercise of her professional judgment on behalf of client); Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts*, 51 FLA. L. REV. 383, 389 (1999) (noting the standard of a lawyer's belief of reasonableness of representation under Rule 1.7 is objective).

[24] See BLACKS LAW DICTIONARY 1463 (7th ed. 1999) (defining a syndicate as "a group organized for a common purpose; an association formed to promote a common interest, carry out a particular business transaction"). *See generally* Charles Robert Davidson, *Reform and Repression in Mubarak's Egypt*, 24 FLETCHER F. WORLD AFF. 75, 84 (2000) (stating professional syndicates include groups of lawyers, doctors, and journalists); Honorable Vaughn R. Walker, *Response: The Task Force Got it Wrong*, 74 TEMPLE L. REV. 783, 794 (2001) (noting a group of lawyers may constitute a syndicate).

may be barred from representing either side of the litigation.[25] Some states have found this to be a per se conflict, while other states have been less harsh, but still found the same result.[26] Critics of both believe no rule should apply in the analysis unless there is some connection between the matter being litigated and the transaction of the syndicate.[27] Comment 3 assists in giving guidance by stating the rationale for the Rule. In effect it states a lawyer retained by an organization represents that organization through its constituents.[28] This guideline is clear enough by itself; however, applying the guidelines found in Comment 2 confuses the matter. It states: "officers, directors, employees and shareholders are the constituents of the corporate organizational client."[29]

In the practical business world, the definition of a subsidiary is nothing more than a corporate form of a shareholder.[30] Comment

[25] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2002) (stating "[O]rdinarily, the lawyer will be forced to withdraw from representing both clients if the common representation fails"); *id.* at R. 1.7 cmt. 4 (recognizing where any conflict regarding multiple clients emerges after representation has been undertaken, whether representation may continue with either party is dependent upon the lawyer's ability to comply with duties to each client (current or prior), and her ability to effectively represent the remaining client, given the duties to her other client); *id.* at R. 1.7 cmt. 7 (noting "if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client").

[26] *See* 22 NYCRR § 1200.28 (stating a lawyer represents the organization and not any of its constituents. According to the comment this means representation does not extend to the organization's directors, employees, shareholders, or other constituents); F.T.C. v. Exxon Corp., 636 F.2d 1336, 1345 (D.C. Cir. 1980) (requiring lawyers to treat a wholly owned subsidiary as a separate and distinct client from its parent corporation); Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 793 (S.D.N.Y. 1991) (noting similar rulings).

[27] *See* Ronald D. Rotunda, *Sister Act: Conflicts of Interest with Sister Corporations*, 1 J. INST. STUD. LEG. ETH. 215, 217-18 (2000) (arguing against per se rules of conflicting interests where there is no substantial relationship between two issues). *See generally* Lawrence E. Mitchell, *Professional Responsibility and the Close Corporations: Toward a Realistic Ethics*, 74 CORNELL L. REV. 466, 484-85 (1989) (elucidating the practical consequences and their effect on lawyers' actions); Charles W. Wolfram, *Legal Ethics: Corporate-Family Conflict*, 2 J. INST. STUD. LEG. ETH. 295, 316-18 (2001) (proposing a more fact sensitive analysis based on close corporation theory and attorney intent).

[28] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 3. *See generally* Ellen A. Pansky, *Between an Ethical Rock and a Hard Place: Balancing Duties to the Organizational Client and Its Constituent*, 37 S. TEX. L. REV. 1167, 1170 (1996) (articulating this as a well-established interpretation adopted by the ABA); Rotunda, *supra* note 27, at 242 (utilizing a hypothetical suit between KFC and Taco Bell to illustrate intent).

[29] MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 2. *See* Pansky, *supra* note 28, at 1170 (providing that under Model Rule 1.13 constituents are officers, directors, employees and shareholders); Rotunda, *supra* note 27, at 236 (indicating the importance of language in Comment 2).

[30] *See generally* John M. Brown, *Parent Corporation's Liability Under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries*, 31 TULSA L.J. 819, 838-

3 further warns the relationship between the attorney and the corporate client, "does not mean, however, that constituents of an organizational client are the clients of the lawyer."[31] Therefore, by default, according to the Code, the lawyer does not represent the organizations subsidiaries.[32] Courts have ruled otherwise and based on such court rulings companies have recently begun the practice of requiring attorneys to sign contracts stating, in effect, that representation of one of the corporation's affiliates transcends to representation of all its subsidiaries and parent corporations.[33]

This would have a dramatic affect in the case of multinational corporations that deal with hundreds of other corporations annually. Florida was the first state to address the issue in a Comment to its State Disciplinary Rules by including the guideline, "an attorney or law firm who represents or has represented a corporation ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, or organization (such as a corporate parent or subsidiary) that is affiliated with the client."[34]

39 (1996) (discussing parent liability for environmental violations); Deborah DeMott, *The Mechanisms of Control*, 13 CONN. J. INT'L. L. 233, 237 (1999) (discussing the control corporations exercise over their subsidiaries); Simon R. Malko, *Determining Parent Corp.'s Liability Against Subsidiary Employee*, EMP. L. STRATEGIST, July 1998, at 1 (discussing parent liability to subsidiary employees).

31 MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 3. *See generally* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFFALO L. REV. 777, 780 (1996) (indicating the importance of this comment for understanding the attorney-client relationship in corporate representation); Wolfram, *supra* note 27, at 319 n.81 (suggesting that the comment extends beyond corporate form).

32 *See generally* Dan S. Boyd, *Current Trends in Conflict of Interest Law*, 53 BAYLOR L. REV. 1, 27-28 (2001) (indicating that initial court interpretation was an "all affiliates" doctrine that treated all related corporate entities as single entity for conflict analysis); William J. Rands, *Domination of a Subsidiary by a Parent*, 32 IND. L. REV. 421, 447 (1999) (discussing the liability of parent corporations); Romansic, *supra* note 14, at 307-08 (stating the increasing complexity of attorney-client relations has led to difficult questions).

33 *See* Rotunda, *supra* note 27, at 232 (suggesting that even silence in an engagement letter can be interpreted to constitute a waiver); Maureen Castellano, *ABA Goes Easy on Corporate Family Conflicts*, N.J.L.J., Mar. 13, 1995, at 3 (citing one of the three dissenting opinions "in all but the rarefied Fortune 500 world, taking on such adverse representation would be outrageous and a clear conflict of interest"); Pansky, *supra* note 28, at 1178-79 (indicating that some jurisdictions require privity of contract to extend the relationship to the constituents).

34 Comment to Fla. Rule 4-1.13, effective Jan. 1, 1992. *See* Ronald D. Rotunda, *Conflicts Problems when Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655, 687 n.104 (1997) (noting the comment's importance in overturning the per se rule of disqualification); Rotunda, *supra* note 27, at 245 n.87 (indicating the importance of the comment regarding per se disqualification).

According to a Formal Opinion issued by the American Bar Association:

> a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client, will materially limit the lawyer's representation of the other client.[35]

A contract between the attorney and the company's affiliates could effectively negate the loophole created by the application of the Model Code and bar the attorney from representing an adverse party against all of the client corporation's subsidiaries.[36]

So far the focus has been on situations without similar subject matter, but critics point out there is also confusion whether the matters overlap.[37] For example, if the subject matter of one of the representations is litigation it is considered a conflict, how-

[35] ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 95-390 (1995), Conflicts of Interest in the Corporate Family Context states in full:

> a lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client, will materially limit the lawyer's representation of the other client. Even if the circumstances are such that client consent is not ethically required, as a matter of prudence and good practice a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation.

See generally Boyd, *supra* note 32, at 27-28 (reviewing emerging trends in conflicts of interest); Romansic, *supra* note 14, at 307-08 (discussing the increasing complexity of corporate families).

[36] *See* Unified Sewage Agency v. Jelco, Inc., 646 F.2d 1339, 1346 n.6 (9th Cir. 1981) (ruling advance waivers are legitimate and noting a party can be estopped from revoking consent where there is reliance). *See generally* Romansic, *supra* note 14, at 311 (indicating the trend among law firms to declare that they represent the corporation alone and not its affiliates or subsidiaries); Rotunda, *supra* note 34, at 673-74 (elucidating closure of the loophole that may be embodied in engagement letters).

[37] *See* Boyd, *supra* note 32, at 11 (distinguishing between related and unrelated matters); *see also* Stephen E. Kalish, *An Instrumental Interpretation of Model Rule 1.7(a) in the Corporate Family Situation: Unintended Consequences in Pandora's Box*, 30 MCGEORGE L. REV. 37, 43 (1998) (relying on a similar case to distinguish unrelated and related matters); Rotunda, *supra* note 34, at 686 (indicating that courts, in at least one instance, have not found a conflict when dealing with unrelated matters).

ever a court may still allow the representation.[38]

The New York County Lawyers' Association Committee on Professional Ethics ruled that a law firm that represents a parent corporation may also represent a party with interests adverse to a subsidiary of the parent corporation in a matter unrelated if: (1) the law firm does not have access to relevant information adverse to the subsidiary; (2) if there is no attorney-client relationship between the law firm and the subsidiary; and (3) if the parent-corporation's interests are not materially affected by actions against its subsidiary.[39] Also, where both representations are transactional, courts are apt to allow the representations, as they are not "'adverse'" to one of the parties.[40]

Courts interpret "'adverse'" to mean "adverse" in the context of litigation, despite a possible contrary definition in the Code.[41] However, Comment 3 gives some guidance, by stating, "a lawyer may not act as advocate against a person the lawyer represents in some other matter."[42] Bankruptcy courts, likewise unable to rely on a definition from the Bankruptcy Code, have defined "'adverse interest'" as any "economic interest that negatively affects the estate or related parties" that could create a potential or ac-

[38] *See* Commonwealth Ins. Co. v. Stone Container Corp., 178 F. Supp. 2d 938, 943 (N.D. Ill. 2001) (holding Rule 1.7 (b) does not bar law firm X during the course of representing client Y against Z, from agreeing to act as expert witness for Z in an unrelated litigation); *see also* Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990) (holding Rule 1.7 does not bar a firm from representing a plaintiff because of an unrelated patent representation of defendant); Picker Int'l, Inc. v. Varian Assocs., 670 F. Supp. 1363 (N.D. Ohio 1987) (holding Rule 1.7 does not bar a firm from representation based on unrelated representation in matters unrelated to the patent suit).

[39] Comm. on Professional Ethics, New York County Lawyers' Ass'n, Op. 684 (1991). *See generally* Patrick M. Connors, *Survey: Professional Responsibility*, 50 SYRACUSE L. REV. 827, 832 (2000) (indicating important restraints on the ABA bright line rule); Kalish, *supra* note 37, at 40 (elucidating the New York opinion).

[40] I.B.M. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978) (holding some "adverse effect may result from the attorney's adversary posture toward that client in another legal matter" and noting one element that may be affected is the attorney's "vigor" in representing his client). *See* Kalish, *supra* note 37, at 40 (indicating a low likelihood of success even given an "appearance of impropriety" rubric); Marla B. Rubin, *Conflicts and the Corporate Client: Fact or Fiction?*, N.Y.L.J., July 20, 1995, at 1 (disagreeing with the decision by the ABA Committee on Ethics to allow multiple representation in some cases without the consent of both parties).

[41] *See* Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1362 (N.D. Ga. 1998) (reviewing the adverse standard in a litigation context); Griva v. Davison, 637 A.2d 830, 843 (D.C. 1994) (discussing adversity under the ABA Model Rules from a litigation perspective); Fisons Corp. v. Atochem N. Am., Inc., No. 90 Civ. 1080, 1990 U.S. Dist. Lexis 15284, *7 (S.D.N.Y. Nov. 14, 1990) (stating the adverse standard in a litigation context).

[42] MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 3.

tual dispute.[43] Illinois has adopted the adverse standard to apply to general attorney conflicts, and the courts in that state have determined both a loan transaction and partnership agreement qualify as adverse interests.[44]

Hypothetical situation III, substantial relation test, is addressed simply in the Successive Conflicts of Interest portion of the Model Rules which stipulates the standard for determining when a lawyer shall not ethically be allowed to represent a client unless the former client consents after consultation.[45] The test is whether the matter to be represented is "'substantially related'" to a matter involved in a former representation, and unlike concurrent representations, is generally not considered prima facie improper.[46] While more lenient, the subsequent representation

[43] *See* Alexander G. Benisatto & Alison M. Fiedler, *The Disinterested Standard of Section 327(a): Applying an Equitable Solution for Potential Conflicts in Small Bankruptcies*, 7 AM. BANKR. INST. L. REV. 363, 369 (1999) (describing section 327 (a) as ensuring undivided loyalty from representing attorneys and requiring termination of counsel to remedy improper administration of estates); *see also* Joseph D. Vaccaro & Marc R. Milano, *Section 327(a): A Statute in Conflict: A Proposed Solution to Conflicts of Interest in Bankruptcy*, 5 AM. BANKR. INST. L. REV. 237, 241 (1997) (indicting bankruptcy courts' inability to uniformly define conflicts of interest as stated in Section 327 (a) of Bankruptcy Code); Gerald K. Smith, *Standards for the Employment of Professionals in Bankruptcy Cases: A Response to Professor Zywicki's "Case for Retaining the Disinterestedness Requirement for Debtor in Possession's Professionals"*, 18 MISS. C. L. REV. 327, 348 (1998) (stating bankruptcy courts have difficulty applying the Code's conflict of interest language which has resulted in a lack of uniformity and certainty).

[44] *See* Ze'-ev Eiger & Brandy Rutan, *Conflicts of Interest: Attorneys Representing Parties With Adverse Interests in the Same Commercial Transaction*, 14 GEO. J. LEGAL ETHICS 945, 947 (2001) (comparing the penalties invoked for failure to advise clients where adverse conflicts exist); David J. Fish, *The Use of the Illinois Rules of Professional Conduct to Establish the Standard of Care in Attorney Malpractice Litigation: An Illogical Practice*, 23 S. ILL. U. L.J. 65, 66-70 (1998) (discussing how Illinois has applied the Model Code's adverse interest standard). *See generally* SWS Fin. Fund A v. Salomon Bros., 790 F. Supp. 1392, 1394 (N.D. Ill. 1992) (holding attorneys liable for undertaking adverse representation for their partnership client).

[45] MODEL RULES OF PROF'L CONDUCT R. 1.9 (stating, "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."). *See generally* Andrew J. Drucker, *Explanations, Suggestions, and Solutions to Conflict Tracking and Prevention in Response to the Growth and Expansion of the Larger Law Firm*, 24 DEL. J. CORP. L. 529, 542 (1999) (discussing Model Rule 1.9's guiding role when there are possible conflicts with former clients); Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 315 (2000) (discussing when Rule 1.9 requires an attorney to obtain her client's consent).

[46] *See* Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1, 6 (1990) (discussing the implications of the doctrines, such as the duty of loyalty and intent to preserve attorney-client relationship, in the standard); *see also* Drucker, *supra* note 45, at 542 (discussing three approaches in defining "substantially related" under Rule 1.9); Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business? The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 66 (1998) (dis-

standard seems to affect a wider variety of situations.[47]

Different states have interpreted the guideline to refer to the timing of when the test should be applied.[48] For example, California courts presume this phrase applies *after* client confidentiality has been abused;[49] New York courts use the standard as a method for attorneys to measure whether similarities in litigation exist *before* they have accepted a client.[50] This difference in timing depending on the state court's interpretation could cause problems in future litigation should a conflicts of laws issue arise.[51] The differences are further compounded when assessing what matters are "'substantially related.'"[52] Two tests are gener-

cussing Model Rule 1.9 and the "substantially related" standard).

[47] *See* Steinberg & Sharpe, *supra* note 46, at 9 (describing the standard for successive conflicts of interest as more 'farther-reaching' than the test for concurrent conflicts). *See generally* Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship - A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 978 (2001) (discussing the subsequent representation standard); Zachary Tobin, *Towards a More Balanced Balancing: A Chronological Approach to Attorney Disqualification for Prior Representation*, 1985 U. ILL. L. REV. 219 (1985) (discussing the loosening of courts' interpretations of subsequent representation and substantial relationship standards).

[48] *See* Exterior Sys. v. Noble Composites, Inc., 210 F. Supp. 2d 1062, 1065 (N.D. Ind. 2001) (analyzing facts that existed when an attorney accepted the client); State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co., 72 Cal. App. 4th 1422, 1430 (App. Dist. 1999) (Dibiaso J., concurring) (suggesting the assumption that confidences were disclosed in a former relationship that may be important in subsequent representation); Cinema 5, Ltd. v. Cinemera, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) (focusing on the time before the attorney accepted the client).

[49] *See State Farm Mut. Auto. Ins. Co.*, 72 Cal. App. 4th at 1430 (applying the test after the client's confidentiality had been abused); Forrest v. Baeza, 58 Cal. App. 4th 65, 73 (App. Dist. 1997) (stating the initial focus should be on the subjects of former and current representation); Flatt v. Superior Court, 885 P.2d 950, 954 (Cal. 1994) (stating that the governing test requires the client demonstrate a "substantial relationship" between the subjects of the antecedent and current representations).

[50] *See Cinema*, 528 F.2d at 1386 (focusing on whether similarities in litigation existed before the attorney accepted the client). *See generally* Aerojet Props., Inc. v. State, 530 N.Y.S.2d 624, 625 (App. Div. 1988) (stating the focus should be on the issues in litigation and the subject matter of prior representation); Leber Assocs. v. Entm't Group Fund, Inc., 00 Civ. 3759, 2001 U.S. Dist. LEXIS 20352, *14 (S.D.N.Y. Dec. 5, 2001) (assessing facts that existed prior to litigation).

[51] *See* Philip K. Lyon & Bruce H. Philips, *Professional Responsibility in the Federal Courts: Consistency Is Cloaked in Confusion*, 50 ARK. L. REV. 59, 73-74 (1997) (suggesting a push to settle reaches the client's substantive rights and therefore the rules of ethics may be subject to the Erie doctrine). *See generally* David Hricik & Jae Ellis, *Disparities in Legal Ethical Standards Between State and Federal Judicial Systems: An Analysis and a Critique*, 13 GEO. J. LEGAL ETHICS 577, 578-79 (2000) (discussing disparities between the state and federal judiciaries' approach to ethics); Bruce A. Green, *Whose Rules Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 460 (1996) (stating that rules of ethics vary from district to district).

[52] *See* Painter, *supra* note 45, at 13. Painter advocates a narrower interpretation of the *Jelco* holding and cites the premise that was suggested in *Cinema 5, Ltd. v. Cinemera, Inc.*, 528 F.2d 1384 (2d Cir. 1976), for measuring conflicts. A subsequent conflict standard requires measuring representation against similarities in litigation whereas the stricter

ally accepted. The first, recognized by New York courts, focuses on the confidentiality between the former client and the attorney and asks whether the matter of the previous representation is within the attorney's knowledge and could be used in a manner detrimental to the former client.[53] The second, less subjective test, looks to whether the former and present representations have similar factual situations.[54]

Under the subjective test, there needs to be only "a reasonable probability that confidential information . . .[had been acquired to] warrant. . . disqualification of counsel" due to a conflict of interest.[55] Courts for these states do not require a showing that the confidences of the former client held by the representing attorney were actually disclosed.[56] It is sufficient to show that the connection between the two matters was sufficiently similar that had they been disclosed the former client would be disadvantaged.[57]

standard for concurrent conflicts measures representation against the duty of undivided loyalty to client. *See generally* Nora J. Pasman, *The Conflict of "Conflict of Interest": The Michigan Example*, 1995 DET. C.L. REV. 133, 137 (1995) (discussing Michigan's approach to the substantially related test); Jay J. Wang, *Conflicts of Interest in Successive Representations: Protecting the Rights of Former Clients*, 11 GEO. J. LEGAL ETHICS 275, 281 (1998) (discussing different states' approach to the substantially related test).

[53] *See* Severino v. Dilorio, 587 N.Y.S. 2d 766, 768 (App. Div. 1992) (focusing on whether matter of previous representation is within the attorney's knowledge and could be used in a manner detrimental to a former client); *Aerojet*, 530 N.Y.S.2d at 625 (focusing on whether the attorney's previous relationship can be used to harm the present client); *Leber Assocs.*, 2001 U.S. Dist. LEXIS 20352, at *14 (determining whether an attorney's prior knowledge can be detrimental to the client).

[54] *See* Elan Transdermal Ltd. v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1387-88 (N.D. Cal. 1992) (focusing on whether former and present representations have similar factual situations). *See generally Forrest*, 58 Cal. App. 4th at 73 (stating the focus should be on the facts in the former and current representation); *Flatt*, 885 P.2d at 954 (focusing on the facts of the litigation).

[55] *Aerojet*, 530 N.Y.S.2d at 625 (alteration in original) (noting the difference in the application of "substantive test" depends on whether the case involves previous and subsequent clients, or simultaneous clients); *see* Greene v. Greene, 47 N.Y.2d 447, 453 (1979) (holding a reasonable probability of disclosure will suffice to disqualify the attorney). *Cf.* Larson v. Rourick, No. C01-2073, 2002 U.S. Dist. LEXIS 19041, at *8–9 (N.D. Iowa Sept. 27, 2002) (indicating a reasonable probability of receipt of confidences, even for expert witnesses, was sufficient grounds for disqualification).

[56] *See* Connors, *supra* note 39, at 834-35 (explaining at a minimum former clients must prove reasonable probability); *The Relationship Between the Texas Disciplinary Rules of Professional Conduct and Legal Malpractice*, 50 BAYLOR L. REV. 697, 725-26 (1995) (explaining that "reasonable probability" is a question of fact). *See generally* Alan H. Casper & Paul R. Taskier, *Vicarious Disqualification of Co-Counsel Because of "Taint"*, 1 GEO. J. LEGAL ETHICS 155, 159-60 (1987) (noting it is often unclear when counsel should be disqualified).

[57] *See* GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1579 (N.D. Ill. 1996) (citing LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 255-56 (7th Cir. 1983), setting forth a three-part inquiry to disqualify an attorney for a conflict of interest); *see also* El Paso v. Soule, 6 F. Supp. 2d 616, 621 (W.D. Tex. 1998) (setting forth a two-part test for disqualifying an attorney); Hunkins v. Lake Placid Vacation Corp., 508 N.Y.S.2d 335, 337

This is practically an irrebuttable presumption that may only be countered by showing the attorney did not switch sides and that the attorney did not share the former client's confidential information with attorneys for the adverse party.[58] Except for a few exclusions to the rule, the test disregards the disadvantage to the lawyer by focusing only on protecting the former client's confidences.[59]

The objective standard, referred to as the "Factual Reconstruction" test shifts the focus to the actual similarities present between the former representation and the subsequent representation.[60] As simple as this standard seems, different courts use different methods to determine whether the situations are factually similar.[61]

Some courts only require a showing of the similarity is necessary, and "actual possession of information is not required for an order of disqualification," but other courts have implemented the standard according to whether a reasonable person would deem the issues involved important enough to be relevant in their similarity.[62] New York requires the similarity to be "patently clear",

(App. Div. 1988) (explaining that a plaintiff must at least show a substantial relationship or specific confidential information that the attorney had already).

[58] *See* United States v. Phillips, 952 F. Supp. 480, 483 (S.D. Tex. 1993) (quoting *In re* American Airlines, Inc., 972 F.2d 605, 614 (5th Cir. 1992) and holding it may be reasonable for confidences to be breached); *see also* British Airways v. Port Auth. of N.Y. & N.J., 862 F. Supp. 889, 893 (E.D.N.Y. 1994) (positing that upon a showing of reasonableness of disclosure, the attorney must show there was no conflict in order to rebut the presumption); *Aerojet*, 530 N.Y.S.2d at 625 (mandating that the burden of proof be on the attorney to prove no actual or apparent conflict of interest existed).

[59] *See* Int'l Paper Co. v. Lloyd Mfg. Co., 555 F. Supp. 125, 133 (N.D. Ill. 1982) (holding the presumption could be rebutted by showing the confidences were not shared with other attorneys in law firm); *GTE North*, 914 F. Supp. at 1580 (quoting Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978), as stating a lawyer may rebut by showing no express representation existed); *Aerojet*, 530 N.Y.S.2d at 625 (emphasizing the importance of requiring undivided loyalty to the client).

[60] *See* Mitchell v. Metro. Life Ins. Co., 01 Civ. 2112 (WHP), 2002 U.S. Dist. LEXIS 4675, at *22–23 (S.D.N.Y. Mar. 21, 2002) (quoting Professor Wolfram on the "factual–reconstruction test" concept). *See generally* Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 781 (7th Cir. 1991) (Cudahy, J., concurring) (setting forth language for factual reconstruction); Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Labs., 607 F.2d 186, 195–96 (7th Cir. 1979) (enumerating a three-part test, which includes the "factual reconstruction" test).

[61] *See* Mitchell, 2002 U.S. Dist. LEXIS 4675, at *22–23 (focusing "factual reconstruction" on prior representation); *see also* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, (7th Cir. 1978) (applying the "factual reconstruction" test to the former representation); Exterior Sys. v. Noble Composites, Inc., 175 F. Supp. 2d 1112, 1115–16 (N.D. Ind. 2001) (clarifying the three parts of the substantial relation test are factual reconstruction, reasonableness of disclosure, and whether information is relevant to subsequent case).

[62] Image Technical Servs. v. Eastman Kodak Co., 820 F. Supp. 1212, 1216-17 (N.D.

meaning "identical" or "substantially the same."[63] New York has also implemented the 'peripheral similarity' exception, allowing an attorney to remain in the representation if the prior involvement with the former client was limited to "brief, informal discussions on procedural matters or research on a specific point of law."[64] Finally, some courts look for the similarities from the vantage of the subsequent litigation, as opposed to an overall comparison of the former and subsequent representations.[65]

Imagine the problems involved with a conflict of law situation where the outcome could turn on how the state interprets the timing and the definition of "substantially related." For example if a New York based law firm represents its California-based client on a transactional basis, confusion will arise as to what standard should be used; whether the standard should be employed before or after the conflict arises.[66] While this rule originally did not apply to all areas of legal practice,[67] case law has effectively created the same standard for the private sector.[68]

Cal. 1993) (explaining the informed consent exception to the basic rule of loyalty to clients); Civil Serv. Comm'n v. Superior Court, 163 Cal. App. 3d 70, 80 (Cal. Ct. App. 1984) (holding an attorney may neither injure nor use information obtained from or harmful to a previous client). *See generally* Wang, *supra,* note 52, at 284 (comparing the two tests).

[63] *Mitchell*, 2002 U.S. Dist. LEXIS 4675, at *12. *See LaSalle Nat'l Bank*, 703 F.2d at 256 (concluding substantially identical agreements were sufficient as grounds for disqualification); United States Football League v. Nat'l Football League, 605 F. Supp. 1448, 1457 (S.D.N.Y. 1985) (reiterating that substantially similar issues must rise to a patently clear threshold in order for disqualification).

[64] Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 756 (2d Cir. 1975). *See Westinghouse*, 588 F.2d at 225 (noting the exception of peripheral representation); *Mitchell*, 2002 U.S. Dist. LEXIS 4675, at *25-26 (illustrating that mere prior peripheral representation may not be sufficient for disqualification).

[65] *Silver Chrysler*, 518 F.2d at 756 (citing the Florida decision in McPartland v. ISI Inv. Serv., 890 F. Supp. 1029, 1032 (M.D. Fla. 1995), which alters the viewpoint of the comparison). *See Castillo*, 938 F.2d at 781 (Cudahy, J., concurring) (focusing on the current litigation). *Cf. LaSalle Nat'l Bank*, 703 F.2d at 255 (comparing prior and subsequent representation).

[66] *See generally* Green, *supra* note 51, at 460 (arguing rules of ethics vary from district to district); Painter, *supra* note 45, at 290 (advocating a narrow interpretation); Wang, *supra* note 52, at 284 (comparing the two tests).

[67] *See* MODEL RULES OF PROF'L CONDUCT R. 1.11 (1998) (stating "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation"); *see also* Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2283-84 (1999) (describing why public interest and pro bono issues must remain exempt from the conflict rules). *See generally* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 371-72 (1981) (finding proof that an attorney notified the relevant parties sufficed to prevent disqualification).

[68] *See* Analytica, Inc. v. NPD Research, 708 F.2d 1263, 1266-77 (7th Cir. 1983) (laying out case law of the same effect as the Code for the substantially related test); *see also* Teradyne, Inc. v. Hewlett-Packard Co., No. C-91-0344 MHP ENE, 1991 U.S. Dist. LEXIS

Another example occurs in the scenario described in Hypothetical IV, affiliated corporations and the substantial relation test. If a former client is a subsidiary of a company adverse to the present representation, the former client may refuse to consent after consultation, not because it feels confidential information may be passed by the attorney, but simply as a method to pressure the opponent to settle, or incur additional expense from the time and energy spent looking for new counsel.[69] This means despite the attention given to the attorney's duty of confidentiality, the representation will cease where a company can use the Rules to its advantage.[70] This situation exemplifies how practical situations in the business world can use the Rules to create results contrary to the purpose of the Rules.

There are two premises underlying the Rule: it is an attempt to stem power or discretion vested in public authority that might be used for the special benefit of a private client as well as considerations of the deeply-rooted duty of loyalty obligation the law firm owes its client.[71] What is surprising is one would assume the rationale would turn solely on the issue of confidentiality, but arguably, the duty of loyalty incorporates to protect the client's

8363, *6–7 (N.D. Cal. June 6, 1991) (referring to Formal Opinion No. 1989-113 of State Bar of California's Standing Committee on Professional Responsibility and Conduct which states, "determining counterpart to 1.7 (b) should be decided by the lawyer evaluating the 'separateness' of the entities, whether the corporation has distinct and independent management and board of directors"). *See generally* Unified Sewage Agency v. Jelco, Inc., 646 F.2d 1339, 1345 (9th Cir. 1981) (inferring the standard must apply even without an existing conflict, even if motion was filed when conflict existed).

[69] *See* Boyd, *supra* note 32, at 18 (noting that ethical rules should not be part of litigation strategies); Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157, 1162 (1996) (hypothesizing that some clients may not grant consent "solely out of a desire to make life difficult for the opponent"). *See generally* Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 794 (S.D.N.Y. 1991) (stating that lawyers can not simply choose between two clients based on which one will be more beneficial to lawyer's interests).

[70] *See Teradyne, Inc.*, 1991 U.S. Dist. LEXIS at *5 (allowing defendant company to disqualify plaintiff's attorneys because of the attorney's prior representation of defendant's subsidiary); Barragree v. Tri-County Elec. Coop., 950 P.2d 1351, 1359 (Kan. 1997) (noting the use of motions to disqualify can be used as litigation tactics); Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 19 (2001) (stating "disqualification motions have great potential for abuse as a litigation tactic").

[71] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2002) (stating the lawyer owes her client a duty of loyalty, even when the duty of confidentiality is not at issue). *See generally* Commonwealth Ins. Co. v. Stone Container Corp., 178 F. Supp. 2d 938, 947 (N.D. Ill. 2001) (discussing the strong duty of loyalty attorneys owe their clients); Smyrna Developers, Inc. v. Bornstein, 177 So.2d 16, 18 (Fla. Dist. Ct. App. 1965) (stating "the attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity").

confidences as well as the duty to represent in a timely and effective manner, to respond to the client's requests and to have no interest in the outcome of the representation.[72] But it would seem this general attention to the duty of loyalty owed to the client undercuts the importance of the client's confidences in a particular conflict issue.[73] This should not be confused with screening individual disqualified lawyers within a firm, but rather is an imputed disqualification of the entire firm where there is no waiver.[74]

PART III—RESOLUTION OPTIONS: PREVENTION, WAIVER, AND DISQUALIFICATION

Prevention and Waiver

Once a conflict is created there are options available to the attorney; some by judicial discretion, some which may come at the behest of the attorney, some from the client.[75] However, before

[72] *See* Marc Pilcher, *You're Killing George, When Professionalism and Business Worlds Collide*, 12 GEO. J. LEGAL ETHICS 829, 833 (1999) (suggesting the Code needs to be revised in the duty of loyalty area because "the ambiguity and diversity in the test's application may be due to the difficulty in establishing whether the purpose of the test is to preserve loyalty or indeed simply to protect clients' confidential information, as these two goals are best served in different ways"). *See generally* Frazier v. Boyle, 206 F.R.D. 480, 491 (E.D. Wis. 2002) (noting that the attorney owes a duty of loyalty notwithstanding the fiduciary duty); Rafferty v. Scurry, 690 N.E.2d 104, 107 (Ohio Ct. App. 1997) (stating an attorney's failure to respond to the client's requests is malpractice).

[73] *See generally* Michael Edelman, *Ethic: Flatt v. Superior Court of Sonoma County: Attorney Withdrawal From Concurrent Representations*, 35 SANTA CLARA L. REV. 1379, 1380 (1995) (stating the duty of loyalty is manifested in numerous ethical rules); Irene Graves, *Confidentiality and Conflicts of Interest: How Waiver Effects Ethical Duties*, 22 J. LEGAL PROF. 267, 267 (1998) (explaining the differences between duty of confidentiality and duty of loyalty); Kenneth F. Krach, Comment, *The Client Fraud Dilemma: A Need For Consensus*, 46 MD. L. REV. 436, 451-54 (1987) (arguing that if the Model Rules require a lawyer to reveal a confidence under it can not be considered disloyalty).

[74] *See* MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 2 (2002) (discussing the principle of loyalty to clients and the fact that law firms are viewed as one lawyer for purposes of disqualification); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 829 (Fed. Cir. 1988) (noting the requirement for disqualifying an entire law firm if one member is disqualified); Gaton v. Health Coalition Inc., 745 So.2d 510, 511 (Fla. Dist. Ct. App. 1999) (acknowledging the presumption that an entire firm is disqualified unless the firm can demonstrate its "new associate has no actual knowledge of any confidential information material to the case").

[75] *See* Commonwealth Ins. Co. v. Graphix Hotline Inc., 808 F. Supp. 1200, 1208 (9th Cir. 1992) (discussing factors to be considered when determining whether a client has waived a potential conflict of interest); Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir. 1983) (noting the client's ability to waive any objection to a conflict of interest); Sapienza v. New York News Inc., 481 F. Supp. 676, 680 (S.D.N.Y. 1979) (deciding that even with a client waiver, "the confidence and respect of the community

the conflict is created there are preventive measures suggested from case law and otherwise that can be taken to lessen the opportunity or fully protect the attorney-client relationship from ever becoming conflicted in the first place including an advanced computer system and the preventive waiver.

One such case-made adaptation to preventing potential conflicts from occurring is presently in place in every large law firm; a networked computer database system connecting all offices of a law firm which allows an attorney can enter a potential client's name and receive an almost instantaneous response as to whether the firm represents an adversary in an on-going litigation or continued transactional relationship.[76]

However, the computerized network only alerts the firm of conflicts that may occur between existing clients and/or potential clients.[77] To avoid situations in which no potential conflict is known, but one may occur over the course of the relationship, law firms are allowed to warn clients ahead of time and request they sign a waiver.[78] Companies also have employed the waiver system to protect the lawyer from representing a party adverse to the corporation's subsidiary.[79]

towards its bench and bar" requires disqualification).

[76] *See* Analytica, Inc. v. NPD Research, 708 F.2d 1263, 1276 (7th Cir. 1983) (Coffey, J., dissenting) (describing the mechanisms available to prevent such conflicts from arising); *see also* LaSalle Nat'l Bank v. Lake Props. Venture, 703 F.2d 252, 258 (7th Cir. 1983) (discussing the possibility of "screening" attorneys with conflicts to protect the entire firm from disqualification); Susan S. Fortney & Jett Hanna, *Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L. J. 669, 690 (2002) (noting the need for electronic database procedures to prevent conflicts of interest).

[77] *See* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS §126 cmt. b (2000) (advising attorneys not to enter business transaction with clients); Fortney & Hanna, *supra* note 76, at 704 (noting an attorney's entrepreneurial activities are much more difficult to check for conflicts). *See generally* Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 GEO. J. LEGAL ETHICS 413, 435-36 (1996) (discussing the disadvantages of having attorneys involved with the management aspects of business).

[78] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-732 (1993) (validating use of a waiver for future conflicts of interests); Lerner, *supra* note 47, at 997 (advocating the use of prospective client waiver forms depending on the sophistication of the client). *But see* Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701, 707 (warning attorneys that prospective client waiver forms should not be relied upon).

[79] *See* Robert E. O'Malley et al., *Misery, Malpractice, and Mail Fraud: Lawyers' Professional Liability in the 90's; ALAS Loss Prevention Manual* C641 ALI-ABA 133, 180 (1991) (discussing the need to get a waiver of confidentiality to check for conflicts). *See generally* Richard Painter, *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1399, 1430-31 (2000) (critiquing the waiver response); William H. Simon, *The Professional Responsibilities of the Public Official's Lawyer: A Case Study From the Clinton Era*, 77 NOTRE DAME L. REV. 999, 1007-08 (2002) (detailing

A preventive waiver offers the benefit of resolving the issue ahead of time and averting a future denial of waiver.[80] This could become a point of leverage, as seen in Hypothetical II. Similarly, law firms can advise their clients to create advance waivers when contracting with their constituents, especially with employment contracts.[81] The question then arises what effect do these options have on law firms, and how do they affect the client?

North Carolina opted to solve the problem by responding to the ABA formal opinion allowing waivers for future conflicts of interest under particular circumstances.[82] In its opinion it describes at what times future waivers are permissible, by setting forth four requirements for the criteria of the waiver: 1) the waiver must be in writing, 2) the waiver must acknowledge the conflict was in contemplation by the parties and the time the waiver was signed, 3) the waiver must clearly reflect the current representation will not be adversely affected by the subsequent representation, and 4) the waiver must stipulate information will not be disclosed or used.[83] In other words the engagement letter is not a

White House Counsel Bernard Nussbaum's reliance on the waiver doctrine).

[80] *See* MODEL RULES OF PROF'L CONDUCT R 1.9 (2002) (requiring consent after consultation); *see also* Wheat v. United States, 486 U.S. 153, 167 n.2 (1988) (Marshall, J., dissenting) (commenting on the difficulty of appraising potential conflicts ahead of time, especially in criminal trials); Lerner, *supra* note 47, at 988 (explaining a prospective client waiver is the only way to prevent future conflicts).

[81] *See* Unified Sewage Agency v. Jelco, Inc., 646 F.2d 1339, 1346 n.6 (9th Cir. 1981) (holding advance waivers valid, allowing simultaneous representation of multiple clients, and noting the client may be estoppped from revoking his consent over time); *see also* Painter, *supra* note 45, at 299 (arguing a narrower interpretation of the *Jelco* holding and also noting that the successive conflict standard measures representation against similarities in litigation, whereas the stricter concurrent standard measures representation against the duty of undivided loyalty). *But see* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321-22 (7th Cir. 1978) (noting there can be no distinction in required disclosure for more sophisticated firms even though they will incur a higher burden altogether).

[82] *See* North Carolina State Bar, Op. RPC 168 (1994) (allowing prospective waivers under certain circumstances); RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR ch. 2 R. 5.1 (West 2002) (modeling state rules after the ABA rules). *See generally* Eric J. Murdock, *Finally, Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act 1989*, 58 GEO. WASH. L. REV. 502, 509-11 (1990) (describing the waiver option as a mitigation mechanism).

[83] *See* NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITIES, North Carolina Formal and Informal Opinions, Revised Proposed RPC 168, Jan. 13, 1994, ABA Ethics 2000 recommendation (outlining when lawyers in North Carolina may obtain advance waivers of conflict of interests); *see also* Ethics 2000, *available at*, http://www.abanet.org/cpr/e2k-rule17rem.html (last visited Mar. 2003). The ABA Ethics 2000 Committee formerly adopted the written requirement for waivers in Feb. 2002. The Committee's comments regarding the writing requirement under Model Rule 1.7 are available at this site. *Cf.* Eiger & Rutan, *supra* note 44, at 949 (noting California's higher

definitive sign of waiver; one must look to the "particular circumstance" of the relationship, particularly client expectations.[84]

The advanced waiver including responsive recourse creates some problems. Because the lawyer cannot be held responsible for knowing all possible conflicts, an advance waiver will never fully cover all situations and the attorney has no knowledge of whether one company intends to use the waiver as leverage against another company.[85] The resolution to both issues comes from the answer to the question at what point should the lawyer ask for the waiver?[86]

In creating the attorney-client relationship, both parties must negotiate their own ideas when coming together.[87] The client

standard of requiring advanced written waivers for potential or actual conflicts).

[84] *See* North Carolina Formal and Informal Opinions; Waiver of Objection to a Possible Future Conflict of Interest, Revised Proposed RPC 168, Jan. 13, 1994. ABA Ethics 2000 recommendation:

> The impetus for seeking prospective waivers has grown as the nature of both law firms and clients has changed. In an era when law firms operated in just one location, when there were few mega-conglomerate clients and when clients typically hired only a single firm to undertake all of their legal business, the thought of seeking prospective waivers rarely arose. However, when corporate clients with multiple operating divisions hired tens if not hundreds of law firms, the idea of that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers.

Although the opinion continues by endorsing the view that such a situation presented a conflict, it recognizes that there was nothing in the example that should prevent a prospective waiver from being effective. *See generally* Painter, *supra* note 45, at 312-13 (positing that ambiguous waivers or waivers signed without counsel should be reviewed for reasonableness by courts); Fred C. Zacharias, *Waiving Conflict of Interests*, 108 YALE L.J. 407, 416-17 (1998) (explaining that judges will not honor a client waiver if the client had insufficient information when signing the waiver).

[85] *See* Michael Lubowitz, *The Right to Counsel of Choice After Wheat v. United States: Whose Choice Is It?*, 39 AM. U. L. REV. 437, 466 (noting the Court in *Wheat* stated that difficulties in foreseeing potential conflicts may invalidate waivers). *See, e.g.*, Kalish, *supra* note 37, at 91 (stating it is unreasonable for attorneys to be expected to know who their future clients will be with adverse interests to current clients). *See generally* Richmond, *supra* note 23, at 422 (arguing that circumstances change between the time when lawyers initially obtain waivers and when conflicts arise).

[86] *See* Rotunda, *supra* note 27, at 230-31 (arguing corporate clients should list affiliates on waivers at the beginning of the representation). *See generally* Robert Hacker & Ronald Rotunda, *Standing, Waiver, Laches and Appealability in Attorney Disqualification Cases*, 3 CORPORATION L. REV. 82 (1980) (explaining that attorneys must practice caution when dealing with possible conflicts of interest); Zacharias, *supra* note 84, at 419 (noting that many jurisdictions will require lawyers to have obtained additional waivers once conflicts actually arise).

[87] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (prohibiting attorneys from concurrent representation of clients with adverse interests). *See generally* Richard W. Painter, *Rules Lawyers Play By*, 76 N Y.U L. REV. 665, 683 (2001) (emphasizing how the client is in a better positions to chose the rules when contracting with attorneys). *But see* Kalish,

must ask himself if this attorney will serve to his advantage at all times; the attorney, on the other hand, must attempt to foresee and prevent all possible conflicts that could arise out of a relationship with this particular client depending on the circumstances of the representation.[88] If the attorney asks the client to sign a waiver to an as-yet-unknown conflict, the client may not want the representation at all.[89] In multiple representation cases where the potential for conflict is even higher, the attorney is required to consider all his other clients.[90] This includes the clients' transactional cases, litigation issues, affiliated companies and each client's opponents.[91] Difficulty arises when the client is asked to waive an as-yet unknown conflict, simply because one may occur in the future.[92]

supra note 37 at 64-65 (criticizing the broad interpretation of client-attorney relationships under freedom of contract terms).

[88] *See* Kalish, *supra* note 37, at 67 (highlighting the lawyers' duties in finding future conflicts of interest as required under Model Rule 1.7). *See generally* Greg Zipes, *Fostering Ethics in Complex Litigation*, 34 SUFFOLK U.L. REV. 53, 55 (2000) (explaining how attorneys are extensions of their client's wishes and may not jointly represent two clients with adverse interests); Lubowitz, *supra* note 85, at 466-67 (arguing courts do not require attorneys to have foreseen all possible conflicts at the time waivers are drawn up).

[89] *See* Pasman, *supra* note 52, at 173 (commenting on how clients practice discretion in choosing which attorneys to use if they do not wish to sign waivers). *See generally* Lerner, *supra* note 47, at 1006 (proposing that "sophisticated" clients who disagree to signing waivers will seek other attorneys for representation). *But see* Fox, *supra* note 78, at 716-17 (arguing existing clients who seek attorneys to represent them in different matters will have no other choice but to sign new preventative waivers).

[90] *See In re* Lanza, 322 A.2d 445, 448 (N.J. 1974) (emphasizing the attorney's role in foreseeing conflict and stating "it is utterly insufficient simply to advise a client that he, the attorney, foresees no conflict of interest and then to ask the client whether the latter will consent to the multiple representation. This is no more than an empty form of words. A client cannot foresee and cannot be expected to foresee the great variety of potential areas of disagreement that may arise . . ."). *See generally* Erik J. Bohlman, *Financing Strategies: Long Term Care for the Elderly*, 2 ELDER L.J. 167, 191 (suggesting that elder law attorneys should fully explain "every potential conflict of interest" to each party); John S. Dzienkowski, *Positional Conflict of Interests*, 71 TEX. L. REV. 457, 459 (1993) (explaining how law firms must consider conflicts with former and current clients).

[91] *See* Gretchen L. Jankowski, *The Ethics Involved in Representing Multiple Parties in a Business Transaction: How to Avoid Being Caught Between Scylla and Charybdis Within the Confines of the Maryland Disciplinary Rules*, 23 U. BALT. L. REV. 179, 210-11 (1993) (critiquing real estate transactions involving multiple representations and comparing the unilateral waiver approach according to New Jersey and South Carolina); Dzienkowski, *supra* note 90, at 459-61 (listing possible "positional conflicts of interests" that may arise which attorneys in law firms must consider); John A. Walton, *Conflicts for Sports and Entertainment Attorneys: The Good News, the Bad News, and the Ugly Consequences*, 5 VILL. SPORTS & ENT. L. J. 259, 271-72 (listing Professor Geoffrey Hazard's "four factors of a transaction" that attorneys should evaluate when considering multiple client representation).

[92] *See* Jankowski, *supra* note 91, at 272 (advocating full disclosure of all possible conflicts); *see also* Painter, *supra* note 87, at 705 (stating that waivers of "general and open-ended conflicts" may not be upheld because clients may not have fully understood the ramifications). *See generally* Fox, *supra* note 78, at 716 (finding difficulty with clients

One example that has arisen in corporate transactions occurs when an attorney counsels a corporation with numerous subsidiaries and parent corporations. The attorney may seek to have employees of company X waive their rights to sue both company X and parent corporation Y as a condition of employment.[93]

Another common situation occurs when clients and their business partners together seek counsel to discuss confidential information concerning their business transactions with an attorney. If the business relationship fails, the former partner's presence breaks the confidentiality of the matter discussed.[94] This issue could have been prevented had the clients signed a waiver form, allowing one side to be represented in case of termination of the business relationship.[95] Similar to a prenuptial agreement, in the sense that such a waiver takes a precautionary role in case of dissolution, such a request may not conform to the client's concept of attorney fidelity.[96]

agreeing to advance waivers because they may not foresee problems).

93 *See* Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 792-93 (S.D.N.Y. 1991) (stating the duty in New York Canon 5 applies, "with equal force where the client is a subsidiary of the entity to be sued"); Kalish, *supra* note 37, at 69 (arguing waivers must be signed by both the parent company and its subsidiary to avoid any future conflicts). *See generally Conflicts of Interests Issues*, 50 BUS. LAW. 1381, 1389 (1995) (concluding that written agreements should be entered into with the parent company and its subsidiaries to minimize potential conflicts).

94 *See* Samuel R. Miller et al., *Conflicts of Interest in Corporate Litigation*, 48 BUS. LAW 141 (1992) (discussing how former partners will attempt to obtain information from the lawyer that represented partnership). *See generally* Robert W. Hilman, *Business Partners as Fiduciaries: Reflections on the Limits of the Doctrine*, 22 CARDOZO L. REV. 51, 55 (arguing that business partnerships have an "inherent conflict of interest" and therefore business partners cannot serve as fiduciaries); Painter, *supra* note 45, at 314 (noting a lawyer will face conflict if a former partner of a joint venture seeks representation during a break-up).

95 *See* Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756, 758 (Cal. Dist. Ct. App. 1993) (holding "that an attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether such a relationship exists turns on finding an agreement, express or implied, that the attorney also represents the partner."). *See, e.g.*, Regina Stango Kelbon et al., *Conflicts, The Appointment of "Professionals," & Fiduciary Duties of Major Parties in Chapter 11*, 8 BANK DEV. J. 349, 422-23 (1991) (arguing that waivers would have prevented conflicts from arising in *In Re* Davenport Partnership Ltd.); Eiger & Rutan, *supra* note 44, at 946 (noting courts have found conflicts when attorneys represent clients with adverse interests within a partnership).

96 *See* Alison J. Chen & Jonathon Sambur, *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?*, 17 HOFSTRA LAB. & EMP. L.J. 165, 166-67 (1999) (discussing the recent emergence of Consensual Relationship Agreements in workplace litigation). *See generally* Fox, *supra* note 78, at 717 (fearing prospective waivers will lead lawyers to choose clients based on higher fees thereby using prospective waivers for their own best interest and not their clients'). *But see* Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 368 (arguing clients will trust lawyers more if lawyers are more informative "at the outset of the relationship").

While the Code assumes the waiver to be in writing, and logically it should be for evidentiary purposes, it is not always manifested that way.[97] A generally accepted practice is an oral acknowledgment that the attorney for the adversary has previously represented your client.[98] Other conflict of interest situations have received public backlash for non-written waivers.[99]

The enforcement of oral waivers also poses problems.[100] Although no court decisions have definitively outlined their validity, because oral waivers are considered settled practice, there is no reason not to accept them, unless the client was insufficiently informed to make a rational decision.[101] Some even argue there is no cause to be overly protective of a corporate client because it is doubtful that one would be so naïve as to be put in a position in which it could be taken advantage of.[102]

[97] According to Willke, Farr & Gallagher partner John S. D'Alimonte, a general practice is to orally waive the other party's counsel. It has yet to be seen how the Supreme Court would rule on the enforceability of an oral waiver, however decisions in other cases suggest it is acceptable. *See generally* Henderson v. Smith, 903 F.2d 534, 537 (8th Cir. 1990) (upholding the validity of an orally waived concurrent conflict in criminal trial); Rotunda, *supra* note 27, at 230-31 (arguing against per se rules of conflicting interests where there is no substantial relationship between the two issues). *But see* Lerner, *supra* note 47, at 1000 (positing that the lawyer trying to enforce an oral waiver would have a heavy burden of proof).

[98] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (a)(2) (1983) (allowing concurrent representation where the client consents after consultation); *see also id.* at cmt. 5 (suggesting a catch-22 where one client refuses to consent to the disclosure); *id.* at R. 1.9 (a) (1983) (allowing subsequent representation but requiring the former client's consent after consultation).

[99] *See* United States v. Gagnon, 470 U.S. 522, 528-29 (1985) (holding a defendant's failure to assert his right sufficed as a waiver because of the "everyday practicalities of conducting a trial"); North Carolina v. Butler, 441 U.S. 369, 373 (1979) (noting "an oral waiver . . . is not . . . necessary or sufficient to establish waiver"); *see also* Edward J. Boyer, *Defense in Denny Case Seeks New Judge: John W. Ouderkirk's Relationship with Former Distr. Atty. Ira Reiner's Executive Secretary Is Cited as a Conflict of Interest*, L.A. TIMES, Apr. 28, 1993, at B1 (reporting judicial conflict and suggesting an oral waiver is insufficient).

[100] *See* Lerner, *supra* note 47, at 999 (pointing out the "uphill battle" attorneys face when attempting to enforce an oral waiver). *Cf.* Beth A. Eisler, *Modification of Sales Contracts Under the Uniform Commercial Code: Section 2-209 Reconsidered*, 57 TENN. L. REV. 401, 409 n.57 (1990) (remarking that alternatives are available to attorneys before they should rely on oral waivers); Larry E. Ribstein, *A Critique of the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 311, 353-54 (1995) (noting that enforcement of oral waivers in any scenario can add complications and raise concerns).

[101] *See* Zacharias, *supra* note 84, at 417 (describing California's rationale for setting aside a client's consent where the client was considered unsophisticated). *See generally* Kelly v. Greason, 244 N.E.2d 456, 462 (N.Y. 1968) (contending that an unsophisticated client in a complex transaction may not be able to comprehend the ramifications of the conflict of interest despite explicit explanation); Lerner, *supra* note 47, at 996 (discussing the relationship between informed consent and memorialization of oral waivers).

[102] *See* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 485 n.201 (1990) (asserting that corporate officers

On the contrary, corporate sophistication has increased, and the savvy client may be well equipped to fend off attorneys seeking to manipulate a waiver from them.[103] The Ethics Committee has recognized these developments and addressed the changes that have taken place in legal practice.[104]

Disqualification and Screening

Where an attorney that formerly represented a client moves firms and finds the new firm representing a client adverse to the attorney's former client, the Rules suggest a conflict exists and disqualification of the representing law firm is necessary.[105] However, case law supports screening the attorney with knowledge as an alternative.[106] Both preserve the two stated functions

usually possess more sophistication than individual clients); *see also* Michael D. Morrison & James R. Old, Jr., *Economic, Exigencies and Ethics: Whose Choice? Emerging Trends in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 396 (2001) (commenting that restrictions on the corporate practice of law are meant to protect the public from scenarios which would permeate the attorney-client privilege); Mark Spiegel, Article, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 B.Y.U. L. REV. 307, 308 (1997) (arguing that corporate clients usually dictate decision-making schemes to their attorneys instead of the other way around).

103 *See* Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 727 (2000) (contrasting the levels of judicial scrutiny afforded to individual client waivers and corporate client waivers); *see also* James R. Harvey III, *Construction Law*, 33 U. RICH. L. REV. 827, 833 (1999) (noting that interactions between corporate parties are usually at arm's length due to the respective sophistication of each); Lerner, *supra* note 47, at 1005 (pointing to the Ethics 2000 differentiation of sophisticated and unsophisticated clients).

104 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993) (noting "the ethical permissibility and effectiveness of a lawyer's obtaining in advance from a present or prospective client a waiver of a conflict of interest that might arise in the future"); *Your ABA: The Score So Far*, 87 A.B.A. J. 81 (2001) (noting which provisions suggested by the Commission were accepted and which suggestions were rejected). *See generally* Charles F. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 962 (2002) (noting that corporate clients have been a major force driving change in the public arena).

105 *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (b) (1983) (noting that an attorney must obtain informed consent in writing before divulging any information acquired through previous client interactions); *see also id.* at cmt. 5 (limiting the application of 1.9 (b) to lawyers or firms with knowledge or information regarding a particular client). *See generally* David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577, 578 (1995) (suggesting that a disqualifying conflict of interest may limit the availability of legal services to clients less financially solid than corporations).

106 *See* Analytica, Inc. v. NPD Research, 708 F.2d 1263, 1267 (7th Cir. 1983) (noting one exception to the "substantial relationship" rule is avoiding disqualification by showing effective measures were taken to prevent disclosure to the lawyers); Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Labs., 607 F.2d 186, 197 (7th Cir. 1979) (arguing the presumption of shared confidences between a firm's members is rebuttable); Freeman v. Chicago Musical Instrument, 689 F.2d 715, 723 (7th Cir. 1982) (remarking that an attorney will rebut the presumption of shared confidences if he can clearly and effectively

of the Rule, namely client confidentiality and avoiding positions adverse to the client.[107]

Disqualification fully bars both the attorney and the attorney's firm from continuing the representation.[108] The Rules recognize this is a harsh result and offer the considerations involved in Comment 3, including loyalty to the former client, unrestricting the present client to choose representation and freedom of lawyers to change jobs.[109] Screening, on the other hand, requires mechanisms be put in place by the law firm to protect the attorney who represented the former client from coming in contact with information regarding the present litigation.[110] A further issue comes with the time, energy and cost incurred from litigat-

show that he had no knowledge of the confidences).

[107] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 1 (1983) (stating the lawyer owes a continuing duty of confidentiality and protection from conflicts of interest to her client even after terminating the relationship); *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157, 162 (3rd Cir. 1984) (explaining the purposes of Rule 1.9 include prevention against betrayal of client confidences, public confidence in the integrity of the bar, and the client's right to loyalty). *See generally* Oxford Sys. v. CellPro, Inc., 45 F. Supp. 2d 1055, 1065 n.4 (W.D. Wash. 1999) (stating, "the principle underlying all conflict of interest rules is duty of loyalty and confidentiality to the client").

[108] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 4-9 (1983) (discussing the ramifications of lawyers that switch firms). *See generally* Bruce A. Green, Doe v. Grievance Committee*: On the Interpretation of Ethical Rules*, 55 BROOKLYN L. REV. 485, 542 n.197 (1989) (explaining the effect of disqualification as a mandatory withdrawal from representation); Andrew P. Romshek, Comment, *The Nebraska Bright Line Rule: The Automatic Disqualification of a Law Firm Due to a New Lawyer's or Nonlawyer's Prior Affiliations ... Sensible Solution or Serious Setback*, 28 CREIGHTON L. REV. 213, 240-41 (1994) (examining the effects of disqualification on the attorney's firm, the attorney, and the client). *But see* Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co., 634 F. Supp. 112, 121 (S.D.N.Y. 1986) (advising that "the substantial relationship test is inapplicable to situations where a law firm's alleged disqualification arises out of simultaneous representation of two clients if each client was aware of the other's relationship to the firm and had no reason to believe that the confidences of one party would be withheld from the other").

[109] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (1983) (offering scenarios in which a lawyer may or may not represent a client with an adverse interest to a former client); *see also* Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617, 2627 n.52 (1999) (suggesting that a lawyer must consult a former client when representing a new client with possible adverse interests). *But see* Randy Lee, *Related Representations in Civil and Criminal Matters: The Night the D.A. Ditched His Date for the Prom*, 29 N. Ky. L. Rev. 281, 305 (2002) (opining that a lawyer is presented with many tempting opportunities to divulge the confidences of a former client).

[110] *See* Drucker, *supra* note 45, at 549-50 (citing several factors that can be used when determining if a screen was or will be effective); Jeremy P. White, *Establishing a Capital Defense Unit in Virginia: A Proposal to Increase the Quality of Representation for Indigent Capital Defendants*, 13 CAP. DEF. J. 323, 355 n.204 (2001) (stating the five essential elements to effectively screen the attorney from the client's confidences). *Cf.* Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403, 439 (2001) (speculating on the use of confidentiality walls to prevent inadvertent client confidence disclosure).

ing to recover the fees paid to the disqualified attorney. Many times the court costs to recover the fee surpass the amount owed.[111]

Post-Conflict and Waiver

After a conflict has been determined to exist, the attorney, according to the Rules, must inform the client and receive consent.[112] Where it is a concurrent transactional basis, the consent must come from both clients and where it occurs in a subsequent transaction or litigation relationship for substantially related matter, the attorney may have to gain consent from both the current and the former client.[113] The difficulty that arises, as seen in Hypothetical I, is the potential misuse of the power to reject a waiver where the conflict exists technically but not substantively. This happens when the client refuses to waive solely for the advantage it receives by forcing the adversary to seek new counsel, which in turn may increase the chances of settling.[114] The writ-

[111] *See Analytica*, 708 F.2d at 1267 (7th Cir. 1983) (ordering the disqualified law firm to pay $25,000 where the cost to bring suit was $130,000). *See generally* Boyd, *supra* note 32, at 24-25 (stating that conflict rules that are too harsh will essentially result in imposing heavier costs of litigation on clients instead of protection of their confidences); Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 100 (2002) (stating that disqualification of counsel raises the costs of litigating, in addition to delaying the discovery process).

[112] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (stating that if an attorney does not receive consent, then she shall not represent that client); *See generally* Lauren R. Frank, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 975, n.132 (stating that the U.S. generally imposes on lawyers broad duties to inform clients of conflicts, in contrast to the European model where lawyers are given more deference to evaluate whether consent is necessary); Pamela Phillips, *Trends in IP Malpractice Claims and How to Avoid Them*, 717 PLI/PAT 621, 666 (2002) (stating that the House adopted the Ethics Commission's proposal that consent under Rules 1.7 and 1.9 be confirmed in writing).

[113] *See* MODEL RULES OF PROF'L CONDUCT R 1.7 (stating that both clients must give consent, confirmed by writing). *See generally* Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice - Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 849 (2002) (noting the three types of conflicts under Model Rules, concurrent, successive, and imputed); Anne N. Walker, *Defending Constructive Discharge of Plaintiffs in Sexual Harassment Cases and Ethical Issues in Representing the Accused Employee*, 676 PLI/LIT 467, 486-87 (2002) (noting that although Rule 1.7 permits lawyers to obtain consent, there are some situations lawyers must be aware of that are nonconsentable, where representation is prohibited).

[114] *See In re* Kelly, 23 N.Y.2d 368, 374-79 (1968) (holding the policy against suing a present client is unwaivable); *id.* at 378 (suggesting times where "[b]ecause the relationships or interests create a substantial likelihood of profound conflict, or for other policy reasons, representation is not permitted under any circumstances"); *In re* A. & B., 44 N.J. 331, 335 (1965) (holding a waiver insufficient for conflicted government lawyers representing adversaries of their client). *See generally* Daniel C. Tepstein, *Confirming an Amended Labor Arbitration Award in Federal Court: The Problem of Functus Officio*, 8 AM. REV. INT'L ARB. 65, 73 (stating that the Model Rules' purpose is defeated when used

ers of the Code foresaw this very potential for abuse and warned of it.[115] Some courts have heeded similar advice where the result would lead to dilatory effects.[116] However, while courts tend to err on the side of over-protection of the client, they admit conflicts such as these are fact-specific.[117]

Because waivers have a settled place in the attorney-client business relationship, attention must be paid to how they should be allowed to be used, at what point in the relationship does requiring a client to sign a waiver become unfair to the client, or to the attorney, and how a system such as this can be utilized without being abused.[118] Some suggest an education system for attorneys, but maybe all that is required is guidance from the Eth-

as "procedural swords").

[115] *See* MODEL RULES OF PROF'L CONDUCT R 1.7, cmt. 15 (stating the "objection [to waive] should be viewed with caution, however, for it can be misused as a technique of harassment"). *See generally* Lyon & Philips, *supra* note 51, at 73-74 (suggesting a push to settle reaches the client's substantive rights and therefore the rules of ethics may be subject to the Erie doctrine); Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 230-31 (1997) (describing three problems arising from obstruction of justice due to delay, including producing unfair settlements).

[116] *See* Pennwalt Corp. v. Plow, Inc., 85 F.R.D. 264, 274 (Del. 1980) (finding efforts to turn Code Canons into "litigation tactic[s]" when an attorney sought withdrawal "troubling"); *In Re* Allied Artists Pictures Corp., 17 B.R. 288, 292 (Bankr. S.D.N.Y. 1982) (finding the appearance of impropriety of a potential conflict outweighs the client's right to choose his own counsel); Wheat v. United States, 486 U.S. 153, 163 (1988) (recognizing that although the government could "manufacture" a conflict to create a disqualification, no per se rule against it is necessary).

[117] In *Teradyne, Inc. v. Hewlett-Packard Co.*, No. C-91-0344 MHP ENE, 1991 U.S. Dist. LEXIS 8363 N.D. Cal. June 6, 1991), the court disqualified the attorneys representing Teradyne Inc., a wholly owned subsidiary of Hewlett-Packard, due to a lack of distinction between the two companies and cited Formal Opinion No. 1989-113 of State Bar of California's Standing Committee on Professional Responsibility and Conduct which interprets California's version of Model Rules. The court held that representation is allowed where "(1) the attorney has not represented and does not now represent the subsidiary, (2) the subsidiary is not the 'alter-ego' of the parent corporation, and (3) there is no adversity between the corporation and the subsidiary on the subject of the representation." *See id.* at *8. *See generally* Hartford Acc. & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534, 538 (S.D.N.Y. 1989) (stating that courts generally do not disqualify counsel solely based on violations of the Code of Professional Responsibility); *Ethics & Issues*, HAW. B.J., Jan. 5, 2001, at 20 (stating that because conflicts are fact specific, clients may not consent to unknown conflicts in advance).

[118] *See* Jon J. Kramer, *Dead Men's Lawyers Tell No Tales: The Attorney-Client Privilege Survives Death*, 89 J. CRIM. L. & CRIMINOLOGY 941, 945 n.22 (citing Martin v. Lauer, 686 F.2d 24, 32-33 (D.C. Cir. 1982), and reinforcing that unless there is an abuse or a waiver, the legal system affords attorney-client communications great protection). *See generally* Ken M. Zeidner, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1332 (2001) (stating that sometimes fairness demands that a waiver be implied in situations where one party seeks to abuse the attorney-client privilege); *Inadvertent Disclosure of Privileged or Confidential Documents*, COL. LAW., Sept. 2001 (stating that clients who enter into attorney-client relationships should not fear that an inadvertent error could lead them to waive their privilege).

ics Committee in addressing these issues.[119]

PART IV – APPLICATION OF THE RULES

How the Law Firms are Affected

Ostensibly one would assume the legal code should adapt to the issues and potential abuses the Code allows, but this is not necessarily what happens. Remaining with the status quo of the Rules as they stand will allow the corporate world to control the situations and resolutions.[120] The simple solution of a law firm bowing out of a potential client relationship effectively stems the law firm's ability to pursue the main focus for which it was created, namely to work.[121] While the debate continues concerning to what extent it is acceptable to refer to a law firm as a job, it is only that, a job.[122]

[119] *See* Julie Davies, *Federal Civil Rights in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 217 (1997) (observing that from the client's perspective, a great emphasis should be placed on the client's education and knowledge of the litigation); *see also* John A. Edginton, *Managing Lawyers' Risks at the Millennium*, 73 TUL. L. REV. 1987, 1996 (1999) (promoting educational programs and risk-management programs to reduce the occurrence of conflicts of interests and address permissible times for waiver use); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 701 (1994) (suggesting that organizations could improve the ethical conduct of lawyers by implementing education programs that put into practice reward structures).

[120] *See* Pilcher, *supra* note 72, at 829 (stating that growth in legal representation and firm size has exposed deficiencies and ambiguities of certain aspects of the Model Rules); *see also* Sonia S. Chan, *Double Billing, Padding and Other Forms of Overbilling*, 9 GEO. J. LEGAL ETHICS 611, 636-37 (1996) (arguing that the ABA should implement new transparency rules because the legal profession has failed to sufficiently monitor its ethical duty to clients with regard to billing practices); Heather A. Wydra, *Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, 62 FORDHAM L. REV. 1517, 1534-35 (1994) (explaining some insufficiencies of the Code and the Model Rules).

[121] *See* Cinema 5, Ltd. v. Cinerama, Inc. 528 F.2d 1384, 1387 (2d Cir. 1976) (relying on the substantial relation test to determine successive conflicts of interest, but measuring the conflict against the duty of undivided loyalty for current client conflicts). *See generally* Pilcher, *supra* note 72, at 830-31 (noting the "substantially related" test is the focal point of Rule 1.9, but its implications have produced some confusion); Gregory C. Sisk, *Iowa's Legal Ethics Rules - It's Time to Join the Crowd*, 47 DRAKE L. REV. 279, 287 (stating that frequent criticism of the Code focused on its failure to differentiate between lawyers in different roles, instead of on litigators).

[122] *See* Bates v. State Bar of Arizona, 433 U.S. 350, 368 (1977). The Court described the thought process behind 'professionalism' by stating commercializing the legal field "will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve." Summarizing, Justice Blackmun concluded "the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception." *Id.*

The argument toward categorizing the legal arena as a profession comes from a desire to differentiate it from a trade.[123] Elements that seem to set the two apart include profit-motivation, the adversarial nature of the field, how the public views the legal field, and lawyer's ability to advertise services.[124]

Client solicitation is addressed in the Model Rules and has been addressed in several Supreme Court decisions.[125] In her dissent in *Shapero v. Kentucky Bar Ass'n.*,[126] Justice Sandra Day O'Connor said because the legal field is a profession and widely accepted as focused on the client's interest, lawyers should not be allowed to solicit their services, when in fact the driving force behind solicitation is the lawyer's pecuniary interest.[127]

See generally Betina A. Suessmann, *Subjective and Objective: You Can't Have One Without the Other: A Recommendation for Model Rule 7.3*, 33 LOY. L.A. L. REV. 229, 235 n.50 (1999) (citing the Canons of Professional Ethics, Canon 27 (1908) which states, "solicitation of business by . . . personal communications, or interviews, not warranted by personal relations, is unprofessional").

123 *See* Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 759 (1988) (arguing that it is detrimental for the legal profession to operate in a business-like manner because of the dangers of losing its sense of altruism and values); Pilcher, *supra* note 72, at 829 (observing the debate over whether the legal profession is considered a trade or a business has been put in the spotlight due to the growth of the legal profession and its increased entanglement in the needs and competitiveness of the business world); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1230 (1995) (asserting that a crisis facing the legal profession can be used as an opportunity to shift the legal paradigm more toward public service with a higher quality of service to clients).

124 *See* Bowie, *supra* note 123, at 743 (stating that an "altruistic spirit" is one factor that distinguishes the legal profession); Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1295 n.137 (1999) (stating what historically distinguished a trade from a profession was that a profession follows higher standards than that which is dictated by law). *But see* Bates v. State Bar of Arizona, 433 U.S. 350, 371-72 (1977) (stating "the belief that lawyers are somehow 'above' trade has become an anachronism").

125 *See* MODEL RULES OF PROF'L CONDUCT R 7.3 (a) (stating "A lawyer shall not in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain"). *See generally* Shapero v. Kentucky Bar Ass'n., 486 U.S. 466, 491 (1988) (O'Connor, J., dissenting) (arguing severe restraints on attorney advertising are necessary for preserving professionalism); Zauder v. Office of Disc. Counsel of Supreme Ct. of Ohio, 471 U.S. 626, 637-38, 642 (1985) (holding that attorney advertisements consisting of illustrations, fee terms, and advice are permissible insofar as they are truthful and non-deceptive); Ohrlik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978) (affirming disciplinary measures against an attorney for aggressively soliciting two accident victims as it did not offend First Amendment rights); Bates v. State Bar of Arizona, 433 U.S. 350, 363, 384 (1977) (holding the Arizona Bar Association's disciplinary rule restricting advertising by attorneys does not violate the Sherman Act but does violate First Amendment rights).

126 486 U.S. 466 (1988).

127 *See id.* at 481-82 (differentiating between the legal profession and standardized consumer products); MODEL RULES OF PROF'L CONDUCT R 7.3 (a) (prohibiting attorney

From the viewpoint of the lay public, the legal field's professional standards have dropped, leaving a sense of unprofessionalism in its wake.[128]

Although the Supreme Court has addressed the matter, it has yet to resolve the issue and arguably the court system is not the proper forum for the determination.[129] More likely a representative group, like the Ethics Committee, made up of numerous attorneys representing a variety of backgrounds from across the country should be the decision maker of such a relevant issue.[130] Whether this will translate into an overall sense that the legal profession has also stepped down from a profession to a trade is yet to be seen.

Similarly, resolution of the ethical questions posed in the hypothetical situations laid out in Part II of this essay may have to be resolved by the answer to whether the legal field is a profession or a trade. If it is a trade, attorneys will accept standards set by others outside the legal arena, for instance from the business world.[131]

solicitations where the primary motive is pecuniary gain); *but see Bates*, 433 U.S. at 368-72 (questioning whether client solicitation truly diminishes legal professionals).

[128] *See Bates*, 433 U.S. at 370-71 (suggesting that public cynicism toward the legal profession may stem from the legal profession's disdain for advertising, yet encouragement of developing client contacts at social events); John C. Buchanan, *Professionalism in the Practice of Law*, 28 VAL. U.L. REV. 563, 563-64 (1994) (comparing Justice Holmes reference to the legal field, "of all secular professions this has the highest [standards]" to former Vice President Dan Quayle's question, "does America really need 70% of the world's lawyers?" to gauge public sentiment regarding lawyers); Allen K. Harris, *The Professionalism Crisis – The "Z" Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 551 (2002) (discussing the harmful effects of "Rambo lawyer tactics", unprofessional, and unethical conduct on the legal profession's once positive image).

[129] *See* Buchanan, *supra* note 128, at 567 (noting courts and disciplinary committees have focused specifically on lawyer advertising); Harris, *supra* note 128, at 555 (noting scarce judiciary and lawyering resources are wasted by addressing attorney professionalism concerns). *But see* Greg N. Anderson & Charles M. Kidd, *Professional Responsibility: Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365, 1365 (2000) (noting that the Indiana Supreme Court has taken an active role in defining the lawyers' relation to the legal profession).

[130] *See generally* Buchanan, *supra* note 128, at 576-81 (noting the International Society of Primerus Law Firms was created to provide lawyers with internal policing standard which resulting in a lawyer's seal of approval); Harris, *supra* note 128, at 560 (discussing a study conducted by the National Conference of Chief Justices which was entirely devoted to addressing attorney professionalism concerns); N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 LA. L. REV. 1, 1 (listing two sources that purport to address and comment on changes in the professional conduct of lawyers).

[131] *See* Buchanan, *supra* note 128, at 575 (cautioning that as the legal profession becomes more concerned with marketing and advertising than client service, it becomes closer to a trade); Harris, *supra* note 128, at 588 (noting an ABA study claims attorneys

The decision of whether the legal field is a profession or a trade will affect who will determine how the conflict of interest issues in the business world will be resolved. If the legal field is deemed a profession, lawyers will continue to create their own ethical rules and not be subjected to norms created outside of the profession.[132] If the trade rubric is superimposed and the state-adopted Model Rules are used, potential clients will be cut off and the law firms will suffer.[133]

A presumption exists that law firms are well adept at gaining new clientele; this may not be the case. In fact, logically, law firms are continually cut out from representing their clients.[134] This reverts the relationship back to the attorney-client relationship originally envisioned by the Code, but undercuts all the achievements and growth in the legal and business worlds.[135]

On the one hand, one law firm representing one client would ensure the most protection of each of the clients.[136] Taken to the

operate now more than ever before as businessmen in industrial and financial marketplaces); W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 568-69 (2001) (noting the decline of the legal profession results in a once elite profession opening itself up to common men).

[132] *See* Buchanan, *supra* note 128, at 574 (proposing that a return to professionalism will occur from within the profession based on a self-imposed set of standards); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 225 (2002) (describing the movement back to lawyers as professionals based on professionals reviving the profession from within); Wendel, *supra* note 131, at 561-63 (explaining one view of professionalism emphasizes self-imposed regulations).

[133] *See* Jonathan R. Macy & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 1005 n.43 (1997) (quoting the Model Code's Disciplinary Rule 5-101 governing conflict of interests); Levine, *supra* note 132, at 217-19 (supporting the position that the legal profession has now become more like a business); Richmond, *supra* note 15, at 61 (noting the Model Code Section 1.7 addresses how attorneys should confront conflicts of interest).

[134] *See* Analytica, Inc. v. NPD Research, 708 F.2d 1263, 1269 (7th Cir. 1983) (referring to Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. BAR FOUND. RES. J. 419 (1982), to acknowledge that disqualification as a remedy has diminished because of its severity to current conflicts of interest); Richmond, *supra* note 15, at 60 (providing examples of clients forcibly being cut from representation due to conflict of interests); Steinberg & Sharpe, *supra* note 46, at 1 (suggesting the growing trend of law firms may impact client representation).

[135] *See* Buchanan, *supra* note 128, at 575 (suggesting that the "spirit of public service" is the true essence of professionalism); Richmond, *supra* note 15, at 59 (noting that it is the client to whom lawyers owe duties of loyalty and confidentiality); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 787 (1998) (suggesting an increased number of parties create more conflicts of interests).

[136] *See* Anastasia M. Pryanikova, *Successive Representation in Cross-Border Practice: Global Ethics or Common Rules?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 325, 326 (2000) (proposing that successful attorney-client relationships protect clients by establishing mutual trust and confidence); Richmond, *supra* note 15, at 62 (recognizing Model Rule 1.7 requires that lawyers' duty to clients to be indivisible among multiple clients); Richmond, *supra* note 23, at 384 (implying representation of multiple clients impairs advo-

extreme, large firms will be unable to represent multinational business. This is due to two main effects occurring. First, the prohibition against conflicted representation will have the harshest affect on the larger firms because these are the firms generally hired to represent the largest corporations.[137] The larger the pool of clients, the more conflict of interest situations will be created. Taking the Rules to the extreme would require law firms to downsize in order to prevent continuous streams of conflicts with current and subsequent clients.[138]

Second, each law firm would effectively become an in-house counsel for a handful of companies because strict application of the Rules would reduce the size of law firms as well as the number of clients each law firm could effectively represent.[139] Further, any efficiency brought on by "'specialized'" firms, i.e. ones focused on an area of specialization like copyright or patent firms, would be negated as they are forced to expand to provide advice to their client on all realms of the their business.[140] Combined, these two factors would consequently infringe on the business world's ability for flexible representation.

The business world's growth, internationally and technologically requires representation for all facets of its problems. This

cacy).

[137] *See* Richmond, *supra* note 15, at 62 (noting that Model Rule 1.7 prevents attorneys who find themselves representing adverse interests from simply eliminating disfavored clients without consent among parties). *See generally* Richmond, *supra* note 23, at 384-86 (positing a hypothetical conflict of interest that may threaten disqualification); Stempel, *supra* note 135, at 796 (proposing a reduction in the complexity of litigation will enable attorneys to be better advocates).

[138] *See* Richmond, *supra* note 15, at 63 (explaining Model Rule 1.9 continues to protect client interests after attorney-client relationship terminates); Stempel, *supra* note 135, at 789 (suggesting over-lawyering in protracted cases only adds to already complex legal issues); Wang, *supra* note 52, at 275 (clarifying that perpetual attorney-client relationships ensure both former clients and new clients receive maximum commitment).

[139] *See* Randall S. Thomas et al., *Megafirms*, 80 N.C. L. Rev. 115, 130 (2001) (explaining that conflicts rules constrain firm growth); *see also* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 586 (1992) (noting that larger sized firms will encounter conflicts of interest rules). *See generally* Larry E. Ribstein, *Limited Liability Companies: Possible Futures for Unincorporated Firms*, 64 U. CIN. L. REV. 319, 331 (1996) (showing that vicarious liability may force firms to avoid risky clients or reduce firm size).

[140] *See* Marla B. Rubin, *Conflicts and the Corporate Client: Fact or Fiction?*, N.Y.L.J. July 20, 1995 (disagreeing with the decision by the ABA Committee on Ethics to allow multiple representation in some cases without both parties consent). *See generally* Richard S. Gruner, *The Role of the General Counsel: Perspective: General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1114 (1997) (noting the use of general council). *But see* Michael Klausner et al., *The Law and Economics of Lawyering: Second Opinions in Litigation*, 84 VA. L. REV. 1411, 1427-28 (1998) (showing how the use of a second opinion might prove useful).

includes a law firm that can represent its client in other countries, and within its specialization. For example, the needs of a multinational such as IBM constitute a broad span, ranging from litigation expertise in patent and copyright law[141] to representation during takeovers of small businesses.[142] Obviously, a small firm will not have the resources or manpower to supply the legal needs for this company, however, a large firm will most likely be blocked from representing IBM because of the conflict rules. This exaggerated result displays the problem that will affect at least a small percentage of law firms. Once it occurs, the effect on the legal field by corporate business will be a collapse of legal representation for those few corporate clients.[143]

How the Client is Affected

A reversion to a situation where each client only has one lawyer overlooks the basis of the legal system, that it is the client's decision who shall represent him in the legal arena and who will serve as his agent.[144] This fundamental principle is usurped, if

[141] *See* John Haystead, *Making the Right Moves; Semiconductor Industry Moves Toward 300mm Wafer Size; Industry Trend or Event?*, ELEC. BUS. TODAY, Feb. 1997 at 52 (describing the new technology multinational corporations are creating); *see also* Benison, *supra* note 103, at 700 (noting the competing costs of conflicts of interest rules). *See generally* Stuart S. Prince, Note, *The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245, 250 (2000) (explaining the need for firms with comprehensive services).

[142] *See* John M. Broeker et al., *Constructing a Legal Department: Finding the Right General Counsel Sets Tone for Success; In-House Attorneys Add Value Through Specialized Knowledge of Business*, CORPORATE LEGAL TIMES, Nov. 1994 at 1 (discussing the importance of maintaining perspective and objectivity through in-house counsel); *see also* Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 730 (1999) (noting the geographic widening of the market for professional services). *See generally* Epstein, *supra* note 139, at 583 (discussing the implications of receiving confidential information from large corporate clients).

[143] *See* Milton C. Regan, *Professional Responsibility and the Corporate Client*, 13 GEO. J. LEGAL ETHICS 197, 208 (2000) (noting the complexity of corporate clients). *See generally* D. Christopher Wells, *Engagement Letters in Transactional Practice: A Reporter's Reflection*, 51 MERCER L. REV. 41, 48 (1999) (explaining problems with the law profession and ethics); Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 222 (1996) (indicating that lawyers are moving from individual clients to corporate clients).

[144] *See* Wheat v. United States, 486 U.S. 153, 162 (1988) (Marshall, J., dissenting) (holding, in criminal trials, a defendant may be denied counsel of choice if a co-defendant could be called as witness against the defendant). *See generally* Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39, 67 (noting clients choose their representation); Henry K. Snyder, *Upholding Forfeiture for Competition and Noncompete Provisions in Law Firm Partnership Agreements: Changing the Focus From the Client's Interests to the Clients'*

the client wishes to use a specialist in litigation for a particular issue from one firm.[145]

Unfortunately, courts interpreting the guidelines provide us with an even more confusing picture of the Rules than the Rules themselves offer. Can a law firm represent A, who is adverse to a subsidiary of client B? Would the answer change if B is no longer a current client but a former client? These questions need answers more suitable to today's corporate world than what the Model Rules offer.

Conclusion

Because of the changes in the legal profession and the business world the Code may need to be updated. The Ethics 2000 Commission expansion of 1.7 shows attention to exactly this type of problem,[146] however they did not determine a problem existed in this area. From their alteration of a similar issue and omission on this topic one could conclude they purposely intend to address the new business relationship in this way. On the other hand, had the commission envisioned this type of relationship, some commentary delineating guidelines should have been included to address the issues.

As it stands, there is no acknowledgment that a change has taken place, creating an ambiguity and inconsistency in the Rules. One suggestion is to create a Commission solely to review how the Code has been altered by the business world.[147] This

Interests, 28 CONN. L. REV. 1259, 1279 (1996) (limiting client choice).

145 *See* Taylor, *supra* note 105, at 590 (suggesting any change in the Model Rules must be grounded in the interest of protecting the client). *See generally* Rebecca Anne Guthrie, *Neglecting a Client's Right to Choose Qualified Counsel: Under Detriment to the Image of the Legal Profession*, 24 J. LEGAL PROF. 411, 412 (1999/2000) (noting that rules must reflect the client's right to choose counsel); Frances Witty Hamermech, Note, *In Defense of a Double Standard in the Rules of Ethics: A Critical Reevaluation of the Chinese Wall and Vicarious Disqualification*, 20 U. MICH. J.L. REFORM 245, 253 (1986) (discussing the interests involved in the client's choice of counsel).

146 *See Your ABA: The Score So Far*, 87 A.B.A.J. 81 (2001) (noting which provisions suggested by the Commission were accepted and which were rejected); *see also* Brustin, *supra* note 113, at 849 (explaining Rule 1.7). *See generally* Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 754 (2001) (explaining that when a conflict arises from personal interests under 1.7 it does not impute to the rest of the firm).

147 *See* Painter, *supra* note 45, at 312 (explaining how businesses bargain over the terms of the waiver); *see also* Fortney & Hanna, *supra* note 76, at 676 (indicating that legal policies and procedures come from business management). *See generally* Robert Rubinson, *Attorney Fact-finding, Ethical Decision-making and the Methodology of Law*, 45 ST. LOUIS U. L.J. 1185, 1221 (2001) (noting ethical problems force clients to take their business elsewhere).

would address, and if change occurred then prevent, the strategic use of the legal rules as a settlement producer. Without investigation into how the Code is being manipulated, the Rules of Professional Responsibility and the legal profession will be rendered the malleable tool of the business world.